shall be perfected by the other.' So in *King v. Wilson*, the same Master of the Rolls laid down the principle in these words:

> Though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed.

So again, in *Pegg v. Wisden*, Sir John Romilly said:

> I concur also in the decisions, that where time is not originally of the essence of the contract, it may, in the case of improper delay, be made so by notice.

Encik Lim Boo Chang, Counsel for the respondent, submitted that failure to issue a notice fixing a reasonable time was not fatal. He relied on *Raineri v. Miles* [1980] 2 All ER 145 (HL) and *Quah Ban Poh v. Dragon Garden Pte Ltd.* [1985] 2 MLJ 159. After examining both decisions, I find they do not support the respondent's case. One of the issues in *Raineri* was the effect of service of completion notice calling on the appellants to complete their contract of sale, and in *Quah Ban Poh*, it was held, *inter alia*, that if the defendant had wanted to make time again of the essence of the contract, it should have given the plaintiff a notice fixing a reasonable time within which he must pay the last instalment.

Therefore, for the reason that the amended statement of claim has failed to plead the vital issue of notice fixing a reasonable time, it is my conclusion that the amended statement of claim has not disclosed a reasonable cause of action.

Thirdly, the learned Magistrate was wrong in law to accept the provision of r. 12(1) of the Regulations as a "reference to determine the question of reasonable time". I am satisfied that the defendant, being an exempt body under s. 2 of the Housing Developers (Control and Licensing) Act (Act 118), the provisions of clause 18(1) of Schedule E of the Regulations do not apply to them.

For the above reasons, this appeal is allowed with costs.

PUBLIC PROSECUTOR

v.

KRISHNA S/O KARUPPAN & ANOR.

HIGH COURT, SHAH ALAM
TUAN AZMEL HJ. MAAMOR JC
[CRIMINAL APPEAL NO. CR 52-25-1988]
9 APRIL 1993

CRIMINAL LAW AND PROCEDURE: Charge of corruption - Appeal against acquittal and discharge - Whether there was a bona fide defence - Whether defence reasonable and plausible - Whether reasonable doubt created in prosecution's case - Whether appeal should be allowed.

The public prosecutor appealed against the acquittal and discharge of the two respondents on charges of corruption under s. 4(c) of the Prevention of Corruption Act 1961. The second respondent was acquitted and discharged at the close of the prosecution case as it was held that a *prima facie* case had not been established against him. The first respondent was acquitted and discharged after his defence had been called as the trial Court Judge found his story to be reasonable and plausible.

Held:

[1] The appeal concerned only points of facts and it is established law that an appellate Court should not disturb any findings of facts of the original Court. Nevertheless having regard to the failure of the trial Judge to consider material facts adduced during the trial, the Court was left with the difficult task of evaluating the facts of the case inspite of being handicapped by being unable to see the demeanour of the witnesses.

[2] The trial Judge had failed to give his reasons in the grounds of judgment for finding the defence story reasonable and plausible. A trial Judge must give reasons why he follows the principle of any decided case. He must evaluate the material facts of the case before him before he can come to the conclusion that the defence story is reasonable and plausible.

[3] The defence of the first respondent in the light of the entire evidence produced during the trial had failed to create any doubt in the prosecution case.

[Appeal against acquittal and discharge of first respondent allowed. First respondent

convicted and sentenced. Appeal against acquittal and discharge of second respondent dismissed].

Case referred to:
Mat v. PP [1963] MLJ 263 ***(cit)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 4(c), 13

For the public prosecutor - Alaudeen bin Ismail, DPP
For the 1st respondent - Jeffrey Fernandez; M/s. Fernandez & Co.
For the 2nd respondent - Ravichandran; M/s. Seah, Balan, Ravi & Co.

JUDGMENT

Azmel Hj. Maamor JC:
This is an appeal by the public prosecutor against the decision of the learned President Sessions Court Kelang acquitting both the respondents on charges of corruption under s. 4(c) of the Prevention of Corruption Act 1961. The 2nd respondent was acquitted and discharged without calling for his defence while the 1st respondent was acquitted and discharged after his defence has been called as the learned President found his story to be reasonable and plausible.

In this case it cannot escape my observation that the record of appeal was contained in 229 sheets, the notes of proceedings has 104 pages and the written submissions by Counsel came up to 99 pages but the grounds of judgment of the learned President were only over 2 pages. I also noted that while the decision was delivered on 23 July 1988 the grounds of judgment of the learned President were only made on 30 May 1992, a lapse of almost 4 years.

I agree with the learned Counsel for the 1st Respondent when he said that this appeal concerns only points of facts. And it is established law that an appellate Court should not disturb any finding of facts of the original Court. However having regard to the circumstances of this case especially on the observation as I have stated above and after having read the learned President's grounds of judgment I am fully convinced that he had not considered many material facts that had been adduced during the trial. It is true that he had made a decision but it cannot be said that he had really given his **grounds** of decision. In the absence of such grounds and having regard to the failure of the learned President to consider material facts adduced during the trial I have no other choice but to do the difficult task of evaluating the facts of the case myself. To a certain extent I am rather handicapped by being unable to see the demeanour of witnesses especially the complainant PW1, whom Counsel for the 1st respondent had cross-examined at length. Had PW1's evidence been based purely on oral testimony then my inability to observe his demeanour while giving his evidence could prove fatal. But in this case there are documentary evidence produced by the prosecution which supported the oral evidence of PW1, particularly Exhibits P3, P3A, P3B, P3C, P3D and P5. I am of the strong view that with the presence of the documentary evidence the oral testimony of any witness can be adequately evaluated even though his demeanour while giving his oral evidence cannot be observed.

Having said that I shall now proceed to consider the evidence as adduced by the prosecution against the 1st respondent first. The main prosecution witness is PW1, the complainant. The offence was alleged to have taken place at PW1's office with BPR officers acting as PW1's workers in the premises of PW1's shophouse. But the actual transaction was not within the sight or hearing of any of the BPR officers. It was PW1's testimony that the 1% commission as demanded by the 1st respondent was worked out at RM2,785.95. When the amount was divided into two it came to RM1,392.98. It was the 1st respondent who requested the amount to be rounded up to RM1,392 each. The oral evidence of PW1 was supported by the writings on P3 written by PW1. The reason why the 1% commission was divided into two was because it was the decision of the 1st respondent who, according to PW1, wanted to share the commission with the 2nd respondent, Abbas bin Mohd. Ali. As a matter of fact the 2nd respondent was present in the office of PW1 during that time. Then how was this sum of RM1,392 to be given to the 1st respondent? According to PW1 the amount of RM1,392 being his share of the commission was to be utilised towards payment of his outstanding debt with PW1. The total amount that the 1st respondent owed PW1 was RM2,200. The

RM2,200 was in respect of purchase of a video cassette recorder costing RM1,950 and a sum of RM250 being the outstanding balance of the cost of a 14 inch colour TV purchased by the 1st respondent. This sum of RM250 being the outstanding balance due from the 1st respondent had also been mentioned in PW1's police report dated 26 March 1984 (Exhibit P2). After utilizing the sum of RM1,392 as part payment of the amount owed by 1st respondent to PW1, there was still an amount of RM808 outstanding. So the 1st respondent issued a cheque for RM808 to PW1 in full settlement of his debt to PW1 amounting to RM2,200. The cheque was produced as Exhibit P4. It was dated 28 March 1984, that is the date of incident. The document P3A reflected such a transaction taking place. It was written by PW1 in the presence of the 1st respondent. PW1 also wrote the 1st respondent's cheque number, 792837 on P3A.

After the 1st respondent paid the cheque to PW1, PW1 then issued a "Jualan Tunai" receipt to the 1st respondent indicating full settlement of his debt and the receipt is produced as Exhibit P5. As a matter of fact P5 was recovered by the BPR officers from the person of the 1st respondent. The learned President in his Alasan Penghakiman stated that the receipt (P5) was for the 1st respondent's payment of RM808. Obviously the learned President had failed to examine Exhibit P5. It cannot be a receipt for the payment of the cheque for RM808 by the 1st respondent. There are 3 items mentioned in P5. Firstly, the price of a VCR amounting to RM1,950, secondly, the balance of the price of CTV 14" amounting to RM250 making a total amount of RM2,200. The third item is the payment of cheque for RM808 by the 1st respondent. PW1 claimed he issued the receipt in settlement of 1st respondent's debt. According to PW1, a cheque for RM808 was paid by the 1st respondent leaving a balance RM1,392. This is the amount of the share of the 1% commission given to the 1st respondent. Obviously P5 cannot be the receipt for the payment of the cheque for RM808 by the 1st respondent as found by the learned President.

That is the gist of the prosecution case against the 1st respondent. I have read the evidence of PW1 including the cross-examination by the Counsel for the 1st respondent. From the evidence of PW1 I am unable to find any question put up by Counsel for the 1st respondent challenging whether Exhibits P3, P3A and P5 were not true. These exhibits were not challenged at all. If these documents were not challenged then they are deemed to be true as stated by PW1 in his oral evidence and I could not find any reason why the Court should not accept them. I do find that the Exhibits P3, P3A and P5 to be supportive of the oral testimony of PW1 on the issue as to how the alleged offence took place at the office of PW1.

At the close of the prosecution case I agree with the learned President in finding that a *prima facie* case was established against the 1st respondent and calling for his defence.

On this decision even the learned Counsel for the 1st respondent, in his submission before me, did admit that he did not quarrel with the decision of the learned President in calling upon the 1st respondent to put up his defence.

But I could not agree with the learned President when he found the defence story to be reasonable and plausible. In his grounds of judgment, he did not give his reasons for finding so. All he did was merely cite and follow the principle of the case of *Mat v. PP* [1963] MLJ 263. In my view a trial Judge must give his reasons why he follows the principle of any decided case. He must evaluate the material facts of the case before him before he can come to the conclusion that the defence story is reasonable and plausible. In this case the learned President had failed to do so. In the light of such failure I again have to evaluate the defence story in the light of the prosecution case myself.

In putting up a defence the 1st respondent had to take into consideration the story of the prosecution witnesses especially the evidence of PW1 which was supported by the relevant documentary evidence. Whatever defence put up by the defence has to be a story which would create doubt on the prosecution case. In this case the defence did not produce any document whatsoever. The defence merely tried to state that the 1st respondent went to PW1' shop with the intention of arranging a new method of repayment of his debt with PW1. As to the Exhibits P3 and P3A the 1st respondent merely said that he was not sure of them. However under

cross-examination the 1st respondent admitted the amount RM808 stated in P3A to be the amount he paid by cheque. He therefore did not deny the existance of P3A. He merely denied P3C being written by him. In my view, the 1st respondent's denial that P3C was written by him would not create any doubt in the prosecution case. The strength of the prosecution case lies in the contents of P3 and P3A. P3 and P3A were written in the presence of the 1st respondent. These 2 documents really supported and corroborated the oral evidence of PW1. The issuance of the receipt P5 was made by PW1 to the 1st respondent for what PWl regarded as the full cash settlement of the amount of RM2,200 owed by the 1st respondent. In fact it was confirmed by the 1st respondent that his purpose of seeing PW1 at his shop was to settle his debt with PW1. Yet, according to the defence story, the arrangement made between PW1 and the 1st respondent on the day of the incident would not have settled his debt to PW1.

The allegation by the Counsel for the 1st respondent that P5 was pre-prepared cannot be sustained. As a matter of fact the 1st respondent had admitted under cross-examination that PW1 wrote P5 in his presence and subsequently it was given to him. Since PW1's evidence was not challenged by the defence on the Exhibits P3, P3A and P5 it should be accepted by the Court. It is therefore highly inconceivable how the learned President could ever come to the finding that the defence story was reasonable and plausible. The Exhibits P3, P3A and P5 are material facts established by the prosecution and unchallenged by the defence.

In his evidence the 1st respondent denied the sum of RM250. Yet that amount was stated in P3, P5 and also in the Police Report P2. These documents were not challenged by the defence. The 1st respondent claimed he only owed PW1 RM1,950. Yet he was found to be in possession of receipt P5 showing the amount to be RM2,200 for which the 1st respondent did not offer any explanation. Mere denial is manifestly inadequate and I therefore could not find his story to be reasonable and plausible at all.

Having carefully considered the defence of the 1st respondent in the light of the entire evidence produced during the trial I arrived at a finding that the defence had failed to create any doubt in the prosecution case. I therefore found the 1st respondent guilty of the offence as charged and I convict him. The decision of the learned President as against the 1st respondent is hereby reversed.

I now deal with the 2nd respondent. Throughout the incident the 2nd respondent had really kept his silence. As confirmed by PW1, the 2nd respondent did not utter a word nor did he participate in any conversation between PW1 and the 1st respondent. I agree with the view of the learned President that the only evidence against the 2nd respondent was the receipt P6 which by itself was quite insufficient to call his defence. The prosecution however tried to produce his cautioned statement. But the learned President after a lengthy trial within a trial decided not to admit the cautioned statement. Why he decided so I do not know. He did not give any reasons for it. Nor did he ever mention this matter in his Alasan Penghakiman. In fact I am quite curious how he decided so. However the prosecution did not seem to quarrel with the decision of the learned President. I have scrutinised the prosecution's petition of appeal. I could not find any complaint by them. Since the prosecution failed to raise it I take it that the prosecution was happy with his decision. I have to assume that the learned President's decision on this issue was correct. In the circumstances, I do not wish to disturb the learned President's decision in discharging and acquitting the 2nd respondent. The appeal against the 2nd respondent is hereby dismissed.

As regards the sentence against the 1st respondent, after having considered all the circumstances of this case and his plea in mitigation I sentenced him to twelve months imprisonment. In addition, he had to pay a penalty of the sum of RM1,392 under s. 13 of the Prevention of Corruption Act, 1961.